Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

John Crosetto, Kenneth J. Doran, and Douglas W. Kammer,
Petitioners

vs.

State Bar of Wisconsin, Stephen L. Smay, Nathan S. Heffernan, Shirley S. Abrahamson, William A. Bablitch, William G. Callow, Louis J. Ceci, Roland B. Day and Donald W. Steinmetz, Justices of the Wisconsin Supreme Court, Respondents

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a motion for declaratory relief is moot when it asserts, *inter alia*, that a bar's current dues reduction plan violates an attorney's First Amendment rights of free speech and association because:

a. the standard used for charging bar activities deviates from *Keller's* guiding standard by requiring payment for activities unrelated to regulating the legal profession or improving the quality of legal services.

b. all chargeable activities are not supported by compelling state interests which cannot be achieved through alternative and less restrictive means.

c. it forces members to arbitrate constitutional challenges to the plan before they can proceed in federal court and gives preclusive effect to any subsequent arbitration awards.

2. Whether attorneys must face imminent disciplinary action before seeking declaratory relief against judges who have sworn that they would not deny their enforcement role and who also are being charged with reversing their decision to make a dues reduction plan retroactive following a disputed *ex parte* communication between one of their agents and a bar official.

3. Whether qualified immunity can be granted to a bar official before a jury decides whether he has violated the Fourteenth Amendment by depriving bar members of their liberty and property without due process of law and by engaging in a policy of subverting their rights by, *inter alia*, forcing them to financially support a political action committee and by having a disputed *ex parte* communication with a court official.

4. Whether a unified bar is entitled to sovereign immunity when it has been denied in related litigation and after that bar states here on three occasions that it would not raise this defense and after it tells the United States Post Office that it is not a governmental entity.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv-vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED	2
STATEMENT	2
1. The Nature of the Case	2
2. The Course of Proceedings Below	8
REASONS FOR GRANTING THE PETITION	12
1. The Wisconsin Supreme Court, By Amending SCR:10:03(5)(b), Has Resolved An Important Federal Question In A Way Which Conflicts With The Court's Decision In *Keller*	14
2. By Amending SCR:10:03(5)(b) And Not Following *Keller's* Guiding Standard, The Wisconsin Supreme Court Has Resolved An Important Federal Question In A Way Which Conflicts With Decisions Of The New Hampshire Supreme Court And Of The United States Court Of Appeals For The First Circuit	15
3. Proper Application Of *Keller* Involves Unsettled And Reoccurring Issues Of Law Which Affect Attorneys In All Unified Bars And Which Can Only Be Settled By This Court	17

TABLE OF CONTENTS—Continued

Page

4. The Court's Power Of Supervision Is Needed To Address Plaintiffs' Claims Which Were Mischaracterized And Thus Never Ruled Upon, Including The Court Of Appeals' Refusal To Address Plaintiffs' Motion Asking That The Current Dues Reduction Plan Be Declared Unconstitutional 21

5. The Holding Below Conflicts With The Court's Prior Holdings Involving Mootness And Plaintiffs' Right To Declaratory Relief And Trial By Jury 24

CONCLUSION 30

Appendix A 1a

Appendix B 20a

Appendix C 22a

Appendix D 50a

Appendix E 56a

Appendix F 69a

Appendix G 71a

Appendix H 73a

TABLE OF AUTHORITIES

Cases:	Page
Abood v. Detroit Board of Education, 431 U.S. 209 (1977), *reh'g denied*, 433 U.S. 915 (1977)	16
Alexander v. Gardner - Denver Co., 415 U.S. 36 (1974)	19
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	27
Beacon Theaters v. Westover, 359 U.S. 500 (1959)	29
Brook Group v. Brown & Williamson Tobacco, __ U.S.__, 113 S. Ct. 2578 (1993)	21
Carey v. Piphus, 435 U.S. 247 (1978)	29
City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982)	24
Crosetto v. Heffernan, 771 F.Supp. 224 (N.D. Ill. 1990)	1
Crosetto v. Heffernan, 810 F.Supp. 966 (N.D. Ill. 1992)	1
Crosetto v. State Bar of Wis., 12 F.3d 1393 (CA 7 1993)	1
Elrod v. Burns, 427 U.S. 347 (1976)	18
FTC v. Grolier, Inc., 462 U.S. 19 (1983)	25
Felder v. Casey, 487 U.S. 131 (1988)	19
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	26
In the Matter of the Amendment of State Bar Rules:SCR:10:03(5), 127 Wis. 2d XI, 374 N.W. 2d XLV (1986)	5
In the Matter of the Amendment of Supreme Court Rules: SCR:10:03(5)(b) - State Bar Membership Dues Reduction, 174 Wis. 2d, xiii (1993)	7
In Matter of State Bar of Wisconsin: Membership, 169 Wis. 2d 21, 484 N.W. 2d 225 (1992)	6
Keller v. State Bar of California, 496 U.S. 1 (1990)	*passim*

TABLE OF AUTHORITIES—Continued

Page

Lathrop v. Donohue, 367 U.S. 820, *reh'g. denied*, 368 U.S. 871 (1961) 17
Levine v. Heffernan, 864 F.2d 457 (CA 7 1988), *cert. denied*, __U.S.__, 110 S. Ct. 204 (1989) 6
Levine v. Supreme Court of Wisconsin, 679 F.Supp. 1478 (W.D. Wis., 1988) ..... *passim*
Mitchell v. Forsyth, 472 U.S. 511 (1985) 26
Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950) 28
Northeastern Florida Contractors v. Jacksonville, __ U.S.__, 113 S. Ct. 2297 (1993) 24,25
Patsy v. Board of Regents, 457 U.S. 496 (1982) 19
Petition of Chapman, 128 N.H. 24, 509 A.2d 753 (1986) 15
Petition to Review Bar Bylaw Amendments, 139 Wis. 2d 686, 407 N.W. 2d 923 (1987) 5
Pulliam v. Allen, 466 U.S. 522 (1984) 28
Report of Committee to Review the State Bar, 112 Wis. 2d XIX, 334 N.W. 2d 544 (1983) 4
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 18
Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (CA 1 1990), *cert. denied*, 112 S. Ct. 865 (1992) 16
St. Louis v. Praprotnick, 485 U.S. 112 (1988) 21
Steffel v. Thompson, 415 U.S. 452 (1974) 28
Supreme Court of Va. v. Consumers Union, 446 U.S. 719 (1980) 28
Teachers v. Hudson, 475 U.S. 292 (1986) 18,19

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTION, STATUTES, AND RULES

U.S. Constitution:
Amendment I ..... *passim*
Amendment VII 29
Amendment XI 11
Amendment XIV ..... *passim*

Statutes:
Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982) *passim*
28 U.S.C. § 1443(a)(3) 2
28 U.S.C. § 1254(1) 2

Rules:
United States Supreme Court Rule 10 12
Wisconsin SCR:10.03(5)(b) ..... *passim*

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No.

JOHN CROSETTO, KENNETH J. DORAN, AND DOUGLAS W. KAMMER, PETITIONERS

vs.

STATE BAR OF WISCONSIN, STEPHEN L. SMAY, NATHAN S. HEFFERNAN, SHIRLEY S. ABRAHAMSON, WILLIAM A. BABLITCH, WILLIAM G. CALLOW, LOUIS J. CECI, ROLAND B. DAY AND DONALD W. STEINMETZ, JUSTICES OF THE WISCONSIN SUPREME COURT,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Plaintiffs-Appellants John Crosetto, Kenneth J. Doran, and Douglas W. Kammer, ("Plaintiffs"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-19a) is reported at 12 F.3d 1396. The District Court's unreported order adopting the Magistrate's report is contained at App., *infra*, 20a–21a. The Magistrate's report (App., *infra*, 22a–51a) is reported at 810 F.Supp. 966. The District Court's dismissal of Defendant Justices as defendants (App., *infra*, 50a–55a) is reported at 771 F.Supp. 224. The District Court's unreported

order denying class certification is contained at App., *infra*, 56a–68a.

JURISDICTION

The District Court's jurisdiction was based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3). The judgment of the Court of Appeals was entered on December 20, 1993, and Plaintiffs' Petition For Rehearing, With Suggestion For Rehearing En Banc, was denied on January 24, 1994 (App., *infra*, 69a–70a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution are the First, Seventh, Eleventh, and Fourteenth Amendments; the applicable provision of the Wisconsin Supreme Court's Rules is SCR:10:03(5)(b); and the pertinent statutory provision is 28 U.S.C. § 1983. All of these provisions are set forth in App., *infra*, 71a-72a.

STATEMENT

1. The Nature of the Case

1. Plaintiffs Crosetto, Doran, and Kammer practice law in the State of Wisconsin and at all times material herein have been required by the individually named Defendant Justices of the Wisconsin Supreme Court, ("Justices"), to belong to the State Bar of Wisconsin, ("State Bar"), and to financially support all of its legislative, political, and other activities except those covered by a dues reduction plan. Throughout this time, Defendant Stephen L. Smay, ("Smay"), has been the State Bar's Executive Director and Edgar E. Lien, ("Lien"), served as its Government Relations Director and lobbyist.

Through Lien, the State Bar operated LAWPAC, a political action committee which gave financial support to political candidates. Defendants State Bar and Smay admit that Plaintiffs' dues money was used to help support Lien's work on

LAWPAC.[1] It is impossible to determine how much of Plaintiffs' dues money was spent on LAWPAC since Lien admits to never recorded any of the time he spent on it.[2] Lien told the State Bar's Board of Governors in a 1981 memorandum (Sep. App. 6):

> . . .
>
> The expedient of renting a separate postal box for LAWPAC, would tend to conceal the relationship of the Bar and LAWPAC and thereby frustrate Legislative intent, but we would not object to the change if it would mitigate any hostility toward LAWPAC.

LAWPAC subsequently obtained a separate postal address which Lien told LAWPAC officers to ignore because they should direct their mail to him at State Bar headquarters (Sep. App. 6). Lien admits to running LAWPAC out of his State Bar office (Sep. App. 178), and a committee appointed by the

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[1] See Defendants State Bar of Wisconsin and Stephen L. Smay Response To Plaintiffs' Request For Admission Of Facts, hereinafter "State Bar Admissions," (Docket No. 394), at 10, Response No. 43. Although not now before this Court, Plaintiffs have referred to the record throughout their petition to support their factual claims and to enable this Court to review these parts of the record, if it so desires. All references to "Docket No." refer to the District Court's docket sheet.

[2] Lien 1989 Dep., p. 4 (Sep. App. 151). References to "Lien 1989 Dep." refer to Lien's August 30, 1989, Deposition (Docket No. 104), and "Lien 1991 Dep." refer to Lien's April 8, 1991, Deposition (Docket No. 307). References to "Smay 1989 Dep.," "Smay 1990 Dep.," and "Smay 1991 Dep." respectively refer to Mr. Smay's August 29, 1989 (Docket Nos. 106, 197), November 26 and 27, 1990 (Docket Nos. 305, 306), and April 8, 1991 (Docket No. 308), depositions. Cited excerpts from the depositions are contained in Plaintiffs' Separate Appendix, ("Sep. App."), which they filed with the Brief and Attached Appendix of Plaintiffs-Appellants John Crosetto, Kenneth J. Doran, and Douglas W. Kammer, ("Plaintiffs' Brief"), to the Court of Appeals. The Reply Brief of Plaintiffs-Appellants John Crosetto, Kenneth J. Doran, and Douglas W. Kammer to the Court of Appeals is hereinafter referred to as "Plaintiffs' Reply Brief."

Wisconsin Supreme Court found that the State Bar controlled LAWPAC and that Lien was "not required to take any time off or in any other way reimburse the State Bar for any of his LAWPAC activities" (Sep. App. 6).

It is impossible to determine how much of Plaintiffs' dues money was spent on each of the State Bar's other political and legislative activities because Lien failed to maintain complete and accurate time records for his expenses.[3] Thus, Mr. Smay has admitted that State Bar employees were not required to fill in and file their time reports—which are used to determine how much money the State Bar spends on given activities—until the eleventh of the following month; i.e., from 11 to 42 days after the fact (Sep. App. 252–253). Lien—whose time records are the focus of Plaintiffs' claims that proper time and other records have not been maintained—testified that he usually did not fill out and file his time reports until the eleventh of the following month because, "I don't discipline myself very well." (Sep. App. 152, 181–182.)

Defendant Justices announced on July 1, 1983, that a legislative dues rebate plan would be established which would "entitle a member to a rebate for that portion of his or her dues spent on all legislative activity ..." and that they would hold further proceedings to establish its details.[4] In March 1984, Defendant Justices issued an Order stating that a legislative rebate plan would be retroactive to July 1, 1983, and that they would hold a public hearing to determine its specific details (Sep. App. 299). Mr. Smay testified that upon receiving the Order, he probably telephoned either Director of State Courts J. Dennis Moran or Wisconsin Supreme Court Administrator William Mann to discuss whether the plan would

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[3] That is why Mr. Smay during his deposition could not ascertain the State Bar's actual legislative expenses on a bill-by-bill basis when given the specific opportunity to examine the State Bar's own files, all of which were in the room and readily available for his inspection (Sep. App. 272-280).

[4] See *Report of Committee to Review the State Bar,* 112 Wis. 2d XIX, XXIV, 334 N.W. 2d 544, 548 (1983).

be retroactive. Smay explained: "I called him up on the telephone. I said is there confusion here [i.e., over the retroactive feature of the dues plan]. I'm not positive I did that, but I think I did." (Sep. App. 203–204.)

At no time thereafter did any Defendants ever inform any State Bar members that the dues rebate plan might not be retroactive to July 1, 1983, or that the Justices were reconsidering the question of retroactivity. The Justices conducted further hearings in 1984 and 1985 and in February 1985 issued an Order proposing four alternative dues rebate plans. In hearings up to that point, Defendants State Bar and Smay represented to the court that: (1) they would maintain proper time and expense records for all bar activities (Sep. App. 10, 16); and (2), a study committee recommended a limited dues reduction plan, when it, in fact, recommended a much broader plan (Sep. App. 15, 18).

In January 1986, the Justices announced that a dues reduction plan would become effective on July 1, 1986, via enactment of Supreme Court Rule 10:03(5)(b), and that a dues reduction would be offered for expenses incurred on direct "legislative advocacy."[5] They did not state why the plan did not cover all legislative activities per their earlier June 1, 1983, decision or why it was not made retroactive to July 1, 1983, per their March 1984 Order.

By order dated May 26, 1988, Defendant Justices suspended the mandatory membership rule pending resolution of the *Levine* litigation which centered on Wisconsin's mandatory

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[5] *In the Matter of the Amendment of State Bar Rules SCR:10:03(5),* 127 Wis. 2d XI, 374 N.W. 2d XLV (1986). Pursuant thereto, the State Bar established a dues reduction plan effective July 1, 1986, which permitted members to arbitrate whether the size of the dues reduction for "legislative advocacy" had been accurately determined, but which did not permit arbitration of any other questions. See *Petition to Review Bar Bylaw Amendments,* 139 Wis. 2d 686, 407 N.W. 2d 923 (1987); Smay 1990 Dep., Ex. 11, at 8.

membership rule (Sep. App. 304),[6] and membership in the State Bar became voluntary between July 1, 1988–June 30, 1992.

The Justices in March 1992 announced reimposition of the mandatory membership rule effective July 1, 1992, and that SCR:10:03(5)(b) (Sep. App. 308–309), was being amended to provide that the State Bar could "use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the State Bar." SCR:10:03(5)(b) also provided for a dues arbitration process for those State Bar members wishing to challenge the accuracy of any dues reduction, but nothing else. *Id.*[7]

Defendants State Bar and Smay, however, ignored this standard and adopted a different standard; i.e., one which charged for all bar activities except those deemed to be "ideological" or "political," thereby requiring Plaintiffs and Wisconsin's approximately 19,000 attorneys to financially support activities which did not relate to either regulating the legal profession or improving the quality of legal services.[8]

Defendants State Bar and Smay acknowledge that they subsequently petitioned the Wisconsin Supreme Court in

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[6] Wisconsin's mandatory membership rule was declared unconstitutional in *Levine v. Supreme Court of Wisconsin*, 679 F.Supp. 1478 (W.D. Wis. 1988). On appeal, that decision was reversed by the United States Court of Appeals for the Seventh Circuit. See *Levine v. Heffernan*, 864 F.2d 457 (CA 7 1988), *cert. denied*, __U.S.__, 110 S. Ct. 204 (1989).

[7] See *In Matter of State Bar of Wisconsin: Membership*, 169 Wis. 2d 21, 484 N.W.2d 225 (1992. Pursuant thereto, Plaintiffs participated in the subsequent dues arbitration proceeding conducted before Arbitrator Edward B. Krinsky. There is a dispute whether Arbitrator Krinsky's award should be part of this record and whether he addressed any of Plaintiffs' constitutional challenges, with Defendants State Bar and Smay asserting at oral argument that he did. Plaintiffs maintain otherwise.

[8] This different standard was set forth in the Notice Concerning State Bar Dues Reduction And Arbitration Process, hereinafter "Notice," which Defendants State Bar and Smay sent to all Wisconsin lawyers in June 1992 (Sep. App. 72-77).

February 1993 to change SCR:10:03(5)(b) so as to provide for all bar expenses being chargeable except those deemed to be "political" or "ideological."[9] In March 1993, Defendant Justices granted the petition by announcing that effective July 1, 1993, SCR:10:03(5)(b) would be changed to that effect, and SCR:10:03(5)(b) so now provides. (App., *infra*, 72a).[10]

2. Plaintiffs filed their initial complaint under 42 U.S.C. § 1983 (App., *infra*, 72a) on May 19, 1988, in the District Court for the Western District of Wisconsin where it was assigned to the Honorable Barbara B. Crabb. In 1990, Plaintiffs amended their complaint, herein "Complaint," (Docket No. 127). to charge that Defendants forced Plaintiffs to financially support the State Bar's LAWPAC and other legislative and political activities from August 1980 to July 1, 1988, contrary to the First and Fourteenth Amendments to the United States Constitution. (App., *infra*, 71a) See Complaint ¶16, at 4; ¶141, at 47.

It also charged that they took away Plaintiffs' property and liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution by: (1) Mr. Smay's disputed *ex parte* telephone call with a representative of the Wisconsin Supreme Court over the July 1, 1983, retroactive feature of a dues reduction plan; (2) the Justices' abandonment of their prior Order to make the plan retroactive; (3) not telling Plaintiffs that Defendant Justices were reconsidering their decision to make the plan retroactive; (4) maintaining faulty procedures for recording employee time, thereby preventing Plaintiffs from knowing where their dues money went; and (5), failing to have any procedures in place before 1986 to provide for the return of any of their dues money spent on constitutionally impermissible subjects such as LAWPAC. See

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[9] See Brief of Defendants-Appellees State Bar of Wisconsin and Stephen L. Smay to the Court of Appeals, ("State Bar Brief"), at 32-33 n.16.

[10] See *In the Matter of the Amendment of Supreme Court Rules 10:03(5)(b) - State Bar Membership Dues Reductions*, 174 Wis. 2d xiii (1993), contained in the Supplemental Appendix to the State Bar's Brief, at 237-238.

Complaint, ¶118–121, ¶141, at 39–41, 47; Pretrial Order ¶11 (Sep. App. 95).

Defendants State Bar and Smay also are charged with engaging in a practice and policy of subverting Plaintiffs' rights by, *inter alia*: (1) forcing Plaintiffs to support LAWPAC; (2) trying to conceal their LAWPAC activities; (3) twice misrepresenting to the Wisconsin Supreme Court that they would maintain proper time and expense records and then not doing so (Sep. App. 10; 16); (4) not requiring employees to fill out and file their time reports until up to 42 days after the fact, thereby making it impossible for Plaintiffs to now determine where their dues money has gone; (5) twice misrepresenting to the Wisconsin Supreme Court that a special study committee favored a limited dues reduction plan when it did not, to maximize how much of Plaintiffs' dues money was spent on their legislative and political activities (Sep. App. 15; 18); and (6), Mr. Smay's apparent *ex parte* telephone call. See Complaint, ¶142 at 47–48; Pretrial Order (Sep. App. 90–92).

Plaintiffs seek a declaratory judgment that the current dues reduction plan is unconstitutional (Docket No. 378), and a preliminary injunction to bar Defendants State Bar and Smay from violating Plaintiffs' constitutional rights by maintaining such an unconstitutional dues reduction plan (Docket Nos. 344, 357). Plaintiffs want a jury trial (Docket Nos. 20, 379), and seek class certification (Docket No. 122). As a remedy, Plaintiffs seek pro-rata legal money damages, nominal and punitive damages. See Complaint, ¶ H, at 50–51.

2. The Course of Proceedings Below

Judge Crabb in June 1988 issued a stay of proceedings (Docket No. 13), pending resolution of *Levine, supra*, which she lifted in December 1988 (Docket No. 27), after the Seventh Circuit Court of Appeals reversed her determination that Wisconsin's mandatory membership rule is unconstitutional. On June 15, 1989, she recused herself because she was a member

of Defendant State Bar (Docket No. 86).[11] The Honorable Stanley J. Roszkowski of the Northern District of Illinois was then designated to hear this matter in another district (Docket No. 87).

Judge Roszkowski on February 21, 1990, issued a second stay of proceedings (Docket No. 132), and lifted it in June 1990 (Docket No. 139), after the Court ruled in *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990), that it is unconstitutional for unified bars such as Defendant State Bar to force bar members to financially support any bar activities which do not meet the "guiding standard" set forth therein; i.e., those which are not "necessarily or reasonably incurred for the purpose of regulating the legal profession 'or improving the quality of legal services available to the people of the State.'"

Judge Roszkowski on November 16, 1990, dismissed the individual Justices as defendants pursuant to their Motion To Dismiss (App., *infra*, 50a–55a). In doing so, he did not address Plaintiffs' claim, set forth in their brief opposing the Motion To Dismiss (Docket No. 146 at 5–8), that the Justices are proper parties to determine whether one of their representatives had the *ex parte* communication testified to by Defendant Smay.

On August 24, 1992, Magistrate P. Michael Mahoney of the Northern District of Illinois issued his Report and Recommendation ("Report"). (App., *infra*, 22a–49a). He recommended that Defendants State Bar and Smay's motion for summary judgment be granted (App., *infra*, 43a); that Plaintiffs' second motion for a preliminary injunction be denied on the ground that it was not "ripe" because Plaintiffs had to submit their constitutional claims to arbitration (App., *infra*, 48a–49a);

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[11] Before she did so, Judge Crabb denied Plaintiffs' Motion for Class Certification without prejudice (App., *infra*, 58a–71a) (Docket No. 85). Plaintiffs subsequently filed an amended motion for class certification and moved to vacate her initial denial of class certification (Docket Nos. 96, 105, 122). Defendants State Bar and Smay opposed the motion (Docket Nos. 99, 169). The District Court dismissed these motions as "moot." (App., *infra*, 51a).

and that all other pending motions be dismissed as "moot." (App., *infra*, 49a).[12]

Instead of addressing Plaintiffs' pending claims, he stated that he would address only those claims which were before Judge Crabb in 1989 (App., *infra*, 37a, n.3). He thus did not address Plaintiffs' subsequent claims, filed after Judge Crabb recused herself, which assert that Defendants State Bar and Smay: (1) engaged in a practice and policy of subverting Plaintiffs' constitutional rights; and (2), deprived Plaintiffs of their liberty and property without due process of law. (Sep. App. 32, 51, 52) He also did not address any of the specific constitutional challenges to the plan.

After Plaintiffs filed detailed Objections to the Report and a supporting memorandum,[13] the District Court on October 22, 1992, issued a minute order adopting, the Report and dismissing Plaintiffs' entire cause of action (App., *infra*, 20a–21a), and final judgment to that effect was entered on October 28, 1992. In doing so, the court: (1) did not address any of Plaintiffs' Objections to the Magistrate's Report; (2) did not explain why the Magistrate's inaccurate characterization of Plaintiffs' claims was being adopted; (3) did not explain why it was refusing to rule on those pending claims; (4) did not address the merits of Plaintiffs' subsequently filed second

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[12] He also discussed an issue which is not even part of this case—the history of Wisconsin's unified bar and the question of whether its mandatory membership rule is constitutional (App. *infra*, 23a–29a). Plaintiffs dropped this complaint allegation after the *Levine* litigation ended (Docket No. 258), and thereafter expressly reiterated that they were not litigating this issue in a July 27, 1992, letter to the Magistrate (Docket No. 359), sent and received prior to issuing his Report.

[13] Plaintiffs there pointed out that the Magistrate had misstated Plaintiffs' claims and that he did not address all the claims pending before the court. (Sep. App. 100–109). Plaintiffs also objected to the Magistrate's statement that Plaintiffs had failed to file a response to Defendants State Bar and Smay's proposed statement of undisputed facts (App., *infra*, 23a). Plaintiffs did prepare such a response, as shown by the District Court's own docket sheet (Docket No. 292). Defendants State Bar and Smay filed a brief in support of the Report and did not file any objections to it (Docket No. 380).

motion for a declaratory judgment (Docket No. 378); and (5), failed to address Plaintiffs' Second Jury Demand asking that a jury decide whether Defendants Smay and State Bar are continuing their policy of subverting Plaintiffs' rights (Docket No. 379).

The Court of Appeals issued its decision on December 22, 1993 (App., *infra*, 1a–19a), affirming in part, vacating in part, and remanding part of the case back to the District Court.

It affirmed the District Court's dismissal of Defendant Justices as defendants on the grounds that "Plaintiffs' prayer for injunctive relief ... fails to present an Article III case or controversy" (App., *infra*, 13a). The court also dismissed Mr. Smay as a defendant on the ground that he was entitled to qualified immunity "Because the law confronting Smay before 1990 did not clearly establish to a sufficient legal consensus that his activities would subject him to any liability ..." under *Keller* (App., *infra*, 16a). The court remanded to the District Court Plaintiffs' allegations against the State Bar to determine if it is entitled to sovereign immunity under the Eleventh Amendment to the United States Constitution (App., *infra*, 71a), and whether, if it is, there are any exceptions to such immunity allowing this matter to proceed to trial (App., *infra*, 9a–13a).

In doing so, the court failed to mention that Defendant Justices have twice admitted to their enforcement role,[14] and that, in response to Plaintiffs' interrogatories, each swore under oath that he/she would not deny acting in that capacity (Docket No. 108). It also failed to find that the State Bar on three occasions in this litigation stated that it would not raise a state agency defense,[15] and that Judge Crabb ruled in *Levine* that

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[14] They did so in their May 26, 1988, Order announcing that the mandatory membership rule "shall not be enforced" (Sep. App. 304), and then in Defendant Justice Heffernan's June 1, 1988, letter to all Wisconsin attorneys to that same effect (Docket No. 146) (Attachment B).

[15] The first representation was made by Attorney John S. Skilton in the midst of Mr. Smay's August 29, 1989, deposition (Smay 1989 Dep., 112-113); (continued...)

the State Bar is not entitled to sovereign immunity *Id.* 679 F.Supp. at 1487–88.

The court also failed to rule on all of Plaintiffs' claims and misstated Plaintiffs' position by stating that Plaintiffs are seeking to enjoin reintegration of Defendant State Bar, (App., *infra*, 6a–7a), which is incorrect; that Plaintiffs are seeking injunctive relief against Defendant Justices, (App., *infra*, 13a-14a), which is incorrect; that Plaintiffs are only charging Defendant Smay with commingling Plaintiffs' dues money with LAWPAC, (App., *infra*, 6a), which is incorrect; and that Plaintiffs concede that their claims against Defendant Justices are not ripe, (App., *infra*, 14a), which is incorrect.

Plaintiffs on January 3, 1994, filed a Petition For Rehearing, With Suggestion For Rehearing En Banc, herein "Petition For Rehearing." It was denied on January 24, 1994, (App., *infra*, 69a–70a), with the Order stating that the original panel members had voted to deny a rehearing and that no member of the court on active service had asked for a vote on whether to grant rehearing.

REASONS FOR GRANTING THE PETITION

The importance of this case to Wisconsin's approximately 19,000 attorneys, and to the many attorneys in the country's other 35 unified bars, is reflected by the fact that Plaintiffs' Petition satisfies virtually all the reasons set forth in Supreme Court Rule 10(a), (b), and (c) as to why review should be granted.

For by forcing Wisconsin's attorneys to support all bar activities except those labeled "political" or "ideological," Defendants have adopted a standard which directly conflicts

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[15](...continued)
the second by Attorney William M. Conley at a February 7, 1991, status conference before Magistrate Mahoney (February 7, 1991, Transcript of Proceedings, at 59, Docket No. 231); and the third in a February 25, 1991, letter from Attorney Conley to Plaintiffs' attorney, Amedeo Greco, (Sep. App. 58-59).

with *Keller's* "guiding standard" and which also conflicts with the standards followed by other state and federal courts. This Court's authoritative voice as the final arbiter of federal questions hence is needed to resolve the ongoing conflict surrounding which constitutional standard must be followed by the country's 36 unified bars.

This Court's direction also is needed to settle some of the important questions which have arisen since *Keller* was decided such as whether a unified bar must prove that all chargeable expenses are justified by compelling state interests which cannot be achieved by alternative and less restrictive means; whether bar members must arbitrate constitutional challenges to a dues plan before they can proceed in federal court; and whether a unified bar is an arm of the state for the purpose of receiving sovereign immunity.

This Court's power of supervision also is needed to address and remedy the Court of Appeals' extraordinary judgment which misstates Plaintiffs' claims at almost every turn and which thereby represents *de facto* conflicts with the Court's prior holdings involving mootness and declaratory relief; qualified immunity; summary judgment; the right to seek declaratory relief against judges; and the right to trial by jury. This Court, as a matter of judicial policy, should not permit its holdings to be disregarded through the misstatements found here.

Even more extraordinary was the court's refusal to acknowledge and address Plaintiffs' motion asking that the current dues plan be declared unconstitutional and its refusal to find the Defendants State Bar and Smay admit to not following *Keller's* guiding standard from July 1, 1992, to the present.

And, most extraordinary of all, the court refused to correct any of its manifest errors even after Plaintiffs pointed them out in their Petition For Rehearing, which was summarily denied without any explanation as to why the court's wholesale mischaracterizations of Plaintiffs' claims were being allowed to stand and why Plaintiffs' stated claims were being ignored.

These errors adversely affect Wisconsin's approximately 19,000 attorneys whose constitutional rights are being violated today under Defendants' unconstitutional dues reduction plan, and whose rights will continue to be violated unless this Court acts to protect them. All this is why further review of this case is needed.

1. The Wisconsin Supreme Court, By Amending SCR:10:03(5)(b), Has Resolved An Important Federal Question In A Way Which Conflicts With The Court's Decision In *Keller*

Keller cannot be any clearer in identifying which bar activities are to be chargeable and which are not, as it provides:

> "Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal services available to the people of the state.'" 496 U.S., at 14.

Under this "guiding standard," then, the only bar expenditures which can be charged are those relating to regulating the legal profession or improving the quality of legal services—and nothing else. Defendants State Bar and Smay, however, admit to following a different standard from July 1, 1993, to the present because SCR:10:03(5)(b) from that date forward has provided:

> The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association. The State Bar may not use compulsory dues of any member who objects to that use for political or ideological activities that are reasonably intended for the purposes of regulating the legal profession or improving the quality of legal services. The State Bar shall fund those political or

> ideological activities by the use of voluntary dues, user fees or other sources of revenue.[16]

In other words, all bar activities are chargeable except those designated as "political" or "ideological." Plaintiffs and Wisconsin's approximately 19,000 other attorneys thus are being forced today to financially support bar activities which are not related to either regulating the legal profession or improving the quality of legal services—in direct violation of *Keller's* "guiding standard." Plaintiffs' petition therefore should be granted so that this Court can declare the present plan unconstitutional and thereby bring about compliance with *Keller*.

2. By Amending SCR:10:03(5)(b) And Not Following *Keller's* Guiding Standard, The Wisconsin Supreme Court Has Resolved An Important Federal Question In A Way Which Conflicts With Decisions Of The New Hampshire Supreme Court And Of The United States Court Of Appeals For The First Circuit

The New Hampshire Supreme Court ruled in *Petition of Chapman*, 128 N.H. 24, 32, 509 A.2d 753, 759 (N.H. 1986), that the New Hampshire Bar Association, a unified bar, had to limit its legislative activities to:

> those matters which are related directly to the efficient administration of the judicial system, the composition and operation of the courts and the education, ethics,

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[16] The Court of Appeals found that SCR:10:03(5)(b) between July 1, 1992-June 30, 1993, was patterned after *Keller* (App., *infra*, 5, n.3). That was true of SCR:10:03(5)(b) before it was modified in 1993. But, the court never ruled on the constitutionality of the now amended SCR:10:03(5)(b)—just as it never addressed Defendants State Bar and Smay's admissions that: (1) they never followed SCR:10:03(5)(b) between July 1, 1992-June 30, 1993; and (2), they have never followed *Keller's* "guiding standard" from July 1, 1992, to the present.

> competence, integrity and regulation, as a body, of the legal profession.

While this standard only covered legislative activities, it nevertheless foreshadowed this Court's subsequent holding in *Keller* and captured the essence of *Keller's* "guiding standard."

Justice Souter, then a member of the New Hampshire Supreme Court, wrote a concurring opinion in *Chapman* which further clarified this issue by stating: "Under *Abood*, a unified bar association may use the dues of a dissenting member to finance lobbying on a legislative proposal reasonably related to the promotion of any such objective," which he earlier identified as involving "the encouragement of competence and integrity among lawyers and judges; the provision of public access to the legal and judicial systems; and the development of efficient mechanisms to secure and enforce legally recognized rights and the intentions of the transacting parties." 128 N.H., at 37. Again, this standard is much narrower than what SCR:10:03(5)(b) now provides and the standard that Defendants State Bar and Smay have followed from July 1, 1992, to the present.

SCR:10:03(5)(b) also conflicts with the decision of the United States Court of Appeals for the First Circuit in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 640 (CA 1 1990), *cert. denied*, 112 S. Ct. 865 (1992), which held:

> 2. "The Colegio may use mandatory dues and fees only for those expenditures that are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the [Commonwealth]," citing *Keller*, 110 S. Ct. at 2236.

Plaintiffs' petition thus should be granted so that the Court can resolve this conflict.

3. Proper Application Of *Keller* Involves Unsettled And Reoccurring Issues Of Law Which Affect Attorneys In All Unified Bars And Which Can Only Be Settled By This Court

Much of this case centers on a question left unresolved by the Court in *Lathrop v. Donohue*, 367 U.S. 820, *reh'g. denied*, 368 U.S. 871 (1961): whether the rights of Wisconsin's approximately 19,000 lawyers have been violated by requiring them in the past to support Defendant State Bar's legislative and political activities, including LAWPAC, and to support various other activities after July 1, 1992, which do not relate to either regulating the legal profession or improving the quality of legal services.

Plaintiffs maintain that the Court answered this question in *Keller* when it ruled that the "guiding standard" must be whether bar activities "are necessarily or reasonably incurred for the purpose or regulating the legal profession or 'improving the quality of the legal services available to the people of the state,'"—a quoted phrase it took directly from *Lathrop*, 367 U.S. at 843 (footnote omitted). Defendants, though, contend that all of the State Bar's activities are properly chargeable under *Keller* except for those labeled "political" or "ideological," even if that means supporting bar activities which are not related to either regulating the legal profession or improving the delivery of legal services. They apparently base their claim on the Court's statement in *Keller*, at 14, that unified bar members are not required to "fund activities of an ideological nature which fall outside of those areas of activity" [i.e., those previously identified at 13–14 as relating to the State's interest in "regulating the legal profession and improving the quality of legal services"], and the Court's further statement that bar members do not have to support "those activities having political or ideological coloration which are not reasonably related to the advancement of such goals ...." *Id.* at 15.

But, this interpretation totally ignores—and indeed renders utterly meaningless—*Keller's* clearly articulated "guiding

standard" which is much narrower than one which charges for all but "ideological" or "political" activities. Hence, Plaintiffs maintain that *Keller's* reference to "political" or "ideological" activities means only that all bar activities which do not fit the "guiding standard" are, by their very definition, political and/or ideological and thus not chargeable.

But what Plaintiffs and Defendants contend is, of course, immaterial since only this Court can definitely resolve which standard must be followed in Wisconsin and elsewhere.

The Court in *Teachers v. Hudson*, 475 U.S. 292–300 (1986), granted certiorari under similar circumstances because of "The importance of the case, and the divergent approaches of other courts to the issue ..." (footnote citation omitted). That is the same situation here since other jurisdictions may have adopted standards which differ from *Keller's* "guiding standard" and since the importance of this case can be seen by the fact that it also directly affects the entire legal profession in the other 35 jurisdictions having unified bars. Indeed, it is difficult to envision many more important issues to the legal profession than the fundamental one raised herein; i.e., which bar activities can be charged and not charged under *Keller* without violating an attorney's First Amendment rights of free speech and association.

Furthermore, important and reoccurring issues have risen which were not resolved in *Keller* and which should be settled here to provide guidance to the lower courts.

Thus, *Keller* did not expressly address whether the Court's rulings in prior union security cases and other First Amendment cases are applicable to unified bars. Plaintiffs maintain that they are and that the present dues reduction plan is unconstitutional because Defendants have failed to prove that all chargeable bar activities are supported by compelling state interests which cannot be achieved through alternative and less restrictive means. See *Elrod v. Burns*, 427 U.S. 347, 362–363 (1976); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Hudson*, 475 U.S. at 303 n.11. Defendants State Bar and Smay disagree, however, as they asserted before the Court of Appeals

that such a burden is "found in plaintiffs' creative imagination, not in case law." (State Bar Brief at 32.)

Still another post-*Keller* issue centers on Defendants' insistence that bar members must submit their constitutional challenges over the current dues plan to arbitration before they can be brought to federal court and that any subsequent arbitration award be given preclusive effect. Plaintiffs maintain that they are not required to arbitrate constitutional issues because the Court has ruled that civil rights' claimants are not required to exhaust state remedies and because Plaintiffs' statutory claims under § 1983 are separate and distinct from their right under the plan to question the size of any dues reduction offered. See *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Felder v. Casey*, 487 U.S. 131 (1988); *Alexander v. Gardner - Denver Co.*, 415 U.S. 36 (1974). In addition, *Hudson*, 475 U.S. at 307 n.21, holds that preclusive effect cannot be given to an arbitration award issued under a union's dues reduction plan.

And finally, only this Court can provide guidance as to when a given unified bar constitutes an arm of the state for the purpose of receiving sovereign immunity. The Court of Appeals stated that this Court "has never directly addressed the sovereign immunity of state bars ..." and it remanded this issue to the District Court (App., *infra*, 9a–13a). But, in listing the criteria to be considered in determining state agency status, the court totally ignored the criteria found dispositive in *Keller*, i.e., that the bar there receives its principal funding from bar dues; that only lawyers admitted to practice law are members; that it performs advisory functions because it does not admit anyone to the practice of law; and that it does not suspend or disbar anyone. *Id.* at 8.

Furthermore, the court erred in stating that all federal courts that have addressed this issue have found particular state bars entitled to the sovereign immunity defense (App., *infra*,

10a–11a). In fact, Judge Crabb ruled in *Levine* that the State Bar is *not* entitled to this defense.[17]

The court also erred in stating, "The parties never addressed the issue of sovereign immunity ...," (App., *infra*, 11-a, n.10). In fact, the State Bar on three occasions in this litigation stated that this defense would not be raised, *supra*, at 12 n.15, and Plaintiffs' Brief at 44–45 related that fact to the court.

This record also establishes that Judge Crabb's earlier findings are still correct and that the State Bar is not a state agency.[18] Indeed, the State Bar has since represented to the

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[17] She found that "A judgment against the State Bar would not affect the state treasury;" that "The State Bar is empowered to sue and be sued;" that "State Bar funds are deposited in accounts held in the name of the State Bar of Wisconsin, not in accounts of the State of Wisconsin;" that "State Bar funds and the Bar's annual budget are under the control of the State Bar board of governors ...;" that "the State Bar's financial autonomy is an important sign of its overall independence;" that "the State Bar sets its own wage rates and classifications;" that "State Bar employees do not participate in health and physician plans offered to state employees;" that "the State Bar may initiate building projects with approval of the Wisconsin Building Commission ...;" and that "it is largely a self-governing entity" whose "day to day decisions are not subject to approval by the supreme court, the legislature or any state agency." *Levine*, 679 F.Supp. 1478, 1487–1488.

[18] It is difficult to see how any entity can be *less* like a state agency, as the State Bar admits here that all of its vehicles are titled in the name of "State Bar of Wisconsin," and not the State of Wisconsin; that the vehicles are not covered by the state's self-insurance pool; that the insured name on its insurance carrier is "State Bar of Wisconsin"; that its utility services are listed under "State Bar of Wisconsin;" that its telephone number is not listed under the State of Wisconsin; that its employees are not covered under the State of Wisconsin's pension plan; that none of its employees have received any credit under the State of Wisconsin's public pension system or longevity program; that its employees do not receive the same pay and leave statements issued to state employees; that it does not follow the hiring procedures established by the state's Bureau of Personnel; that it does not hire its employees off of eligibility lists established by the state's Bureau of Personnel or any other state agency; that prospective employees are not required to take any state administered exams or tests to be considered for State Bar employment; that it did not follow the state's bidding rules for state agencies

(continued...)

United States Post Office: *"The Bar is not a governmental entity."* (Emphasis added.)[19]

This Court can settle this dispute and provide guidance on an issue likely to recur in § 1983 litigation against unified bars, as this matter was considered by the Court of Appeals and thus is properly before this Court. See *St. Louis v. Praprotnick*, 485 U.S. 112, 120–121 (1988). Moreover, the Court has ruled that while "it is not customary for this Court to review the sufficiency of the evidence ...,"it would do so when "the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditures of judicial resources." *Brook Group v. Brown & Williamson Tobacco*, ___U.S.__, 113 S. Ct. 2578, 2591–2592 (1993).

4. The Court's Power Of Supervision Is Needed To Address Plaintiffs' Claims Which Were Mischaracterized And Thus Never Ruled Upon, Including The Court Of Appeals' Refusal To Address Plaintiffs' Motion Asking That The

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[18](...continued)
when it remodeled its office building; that it does not follow the procedures relating to printing services set forth in state statutes; that the legal name used in all of its legal contracts is "State Bar of Wisconsin;" that the legal name on the W-2 forms it issues is "State Bar of Wisconsin;" that the legal name on its social security records and unemployment compensation account is "State Bar of Wisconsin;" that it is unaware of ever posting any official notices issued by the Wisconsin Department of Employee Relations; that when it purchased property it did not follow the state's rules and regulations established for other state agencies; that it has not attempted to implement the State of Wisconsin's affirmative action and equal opportunity programs; and that it does not file any reports with either the State of Wisconsin's Department of Administration or its Department of Employee Relations. See Supplemental Response of Defendant State Bar to Plaintiffs' Second Set of Interrogatories (Docket No. 410).

[19] Appendix Ex. 2, at 2, Plaintiffs' Proposed Findings of Fact and Conclusions of Law (Docket No. 261).

Current Dues Reduction Plan Be Declared Unconstitutional

The Court's power of supervision is needed here because the District Court departed from the usual course of proceedings by adopting the Magistrate's faulty Report which mischaracterized Plaintiffs' claims as being the same now as they were before Judge Crabb in 1989, (App., *infra*, 37a, n.3), and by refusing to address all of the claims pending before it noted, *supra*, at 10–11. The Court of Appeals, in turn, sanctioned these errors as it, too, mischaracterized Plaintiffs' claims and refused to address all of the claims before it.

Hence, there is not one word in its decision referring to Plaintiffs' second motion for a declaratory judgment asking that the current plan be declared unconstitutional even though: (1) Plaintiffs argued it in their Brief at 40–41, and Reply Brief at 16; (2) Plaintiffs' counsel addressed it in oral argument; and (3), Plaintiffs' Petition For Rehearing at 3–8 pointed out that this motion was pending before the court. The court's refusal to even acknowledge the existence of this motion is inexplicable. It also represents a gross departure from the accepted and usual course of judicial proceedings which dictates that a court must, at the very least, correctly identify all of the claims before it and to then address them *seriatim*.

The Court of Appeals similarly departed from the usual course of judicial proceedings and abused its discretion by:

1. Refusing to find that Defendants State Bar and Smay admit that the dues reduction plan—as applied from July 1, 1992, to the present—has only covered "political" and "ideological" expenses and that it has not followed *Keller's* "guiding standard" as to which bar activities are chargeable.
2. Refusing to address Plaintiffs' claim that Mr. Smay has engaged, and is engaging, in a practice and policy of subverting

Plaintiffs' rights and that he cannot be granted qualified immunity until a jury decides these disputed issues.[20]

3. Refusing to address Plaintiffs' claim that Mr. Smay is not entitled to qualified immunity for his post-July 1, 1990, conduct because he never pleaded that defense to such conduct.[21]

4. Refusing to find that Defendants State Bar and Smay have admitted to spending Plaintiffs' dues money on LAWPAC and by wrongly stating that Defendant Smay has only been charged with commingling Plaintiffs' dues money (App., *infra*, 6a).[22]

5. Refusing to rule on Plaintiffs' claims that they are entitled to declaratory relief and an award of attorney fees against Defendant Justices, and by wrongly asserting that Plaintiffs are seeking injunctive relief against them (App., *infra*, 13a–14a).[23]

6. Refusing to address Plaintiffs' claim that Defendant Justices are proper parties for the purpose of determining whether any of their representatives had the *ex parte* communication testified to by Mr. Smay, *supra*, at 4.[24]

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[20] Plaintiffs' Brief at 25–26, 31–32; Reply Brief at 9–10; and Petition For Rehearing at 10–13 all pointed out that Mr. Smay is not now entitled to qualified immunity in the face of these disputed factual claims.

[21] Plaintiffs' Brief at 28; Reply Brief at 10; and Petition For Rehearing at 11–12 all pointed out that Mr. Smay is not entitled to qualified immunity for his post-1990 conduct—an issue which he did not even dispute.

[22] See State Bar Admissions Response No. 43, at 10. In fact, Plaintiffs have never charged mere "commingling," as they, instead, have pointed to Defendant Smay's own admission that Plaintiffs' dues money was directly spent on Lien's LAWPAC activities. See Plaintiffs' Brief at 12, 25, 31; Reply Brief at 7, 11; and Petition For Rehearing at 11. Furthermore, Plaintiffs' counsel pointed out this admission during oral argument in response to a question posed by a panel member and it was not disputed by counsel for Defendants State Bar and Smay.

[23] Plaintiffs' Brief at 26–27, 42–43; Reply Brief at 2, 20–22; and Petition For Rehearing at 13 all pointed out that Plaintiffs are not seeking injunctive relief against Defendant Justices.

[24] Plaintiffs' Brief at 26–27, 42–43; Reply Brief at 20–23; and Petition For Rehearing at 13–14 all spelled out Plaintiffs' claims against Defendant Justices.

These errors, too, are inexplicable, as was the court's refusal to correct any of them even after Plaintiffs' Petition For Rehearing spelled them out.[25] While of course impossible to determine how the court committed so many errors, it is possible that Defendants' own misstatements to the court contributed to this problem. As can be seen in the Table of Contents in Plaintiffs' Reply Brief (App., *infra*, 73a–78a), Plaintiffs tried to correct these misstatements, but to no avail.

This Court's power of supervision thus is needed because Plaintiffs have been denied the most basic right of all which must be accorded to every litigant in the federal courts—the right to, at the very least, have their claims correctly identified, as that is the very linchpin upon which all judicial proceedings must turn. For when that linchpin is missing, subsequent proceedings will fail to properly address all pending claims and thus will produce the kind of conflicts with the Court's prior holdings detailed immediately below.

5. The Holding Below Conflicts With The Court's Prior Holdings Involving Mootness And Plaintiffs' Right To Declaratory Relief And Trial By Jury

By misstating Plaintiffs' claims, and by refusing to address them even after Plaintiffs' Petition For Rehearing pointed them out, the Court of Appeals' decision represents a *de facto* conflict with *five* of the Court's prior holdings.

One, by ignoring Plaintiffs' second motion for a declaratory judgment, the holding sustains the District Court's dismissal of the motion as "moot" (App., *infra*, 49a) and thus conflicts with

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[25] The Court also erred in stating that Plaintiffs' pending injunction motion is aimed at halting reintegration of the bar. (App., *infra*, 16). In fact, and as pointed out in their Brief at 9–10, Reply Brief at 1–2, and Petition for Rehearing at 9, it is aimed at prohibiting Defendants State Bar and Smay from violating Plaintiffs' rights by maintaining their unconstitutional dues reduction plan (Docket Nos. 344, 357). Plaintiffs are not asking the Court to rule on their injunction motion. They, instead, request that it be remanded to the District Court for further proceedings if the Court finds the present plan unconstitutional for any of the reasons stated herein.

Northeastern Florida Contractors v. Jacksonville, __ U.S.__, 113 S. Ct. 2297, 2301 (1993). There, the Court cited *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), for the "well settled" rule that minor changes in a challenged statute which is still in effect do not render the challenges "moot."[26]

Moreover, Plaintiffs have satisfied the test repeated in *Northeastern Florida Contractors* at 2301, 2302 for invoking a federal court's jurisdiction: (1) they have suffered, and are continuing to suffer, an "injury in fact" in violation of their First Amendment rights because of Defendants' insistence that Plaintiffs support bar activities which do not meet *Keller's* "guiding standard" and because of Defendants' failure to otherwise establish a constitutionally valid dues reduction plan; (2) this ongoing injury is being directly caused by Defendants and not by some third party; and (3), this ongoing injury can be redressed by granting Plaintiffs' requests for declaratory relief and by allowing Plaintiffs to go to trial over the disputed genuine issues of material fact raised in Plaintiffs' Second Jury Demand (Docket No. 379).

Plaintiffs therefore are entitled to a declaration that the present dues reduction plan is unconstitutional because: (1) it does not follow *Keller's* "guiding standard;" (2) it requires State Bar members to go to arbitration before they can bring any of their constitutional claims in federal court and imposes an unlawful exhaustion requirement; (3) it gives unlawful preclusive effect to any arbitration award issued under the plan; (4) the Notice fails to warn prospective objectors that by

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[26] Since the Court of Appeals failed to even mention this pending motion, it is unknown whether its refusal to grant this declaratory relief was predicated on the fact that SCR:10:03(5)(b) was amended effective July 1, 1993, as Defendants State Bar and Smay pointed out in their Brief, at 32–33 n.16. That amendment, however, is insufficient to "moot" this issue since SCR:10:03(5)(b) still does not follow *Keller's* "guiding standard" and since Plaintiffs' other undisputed constitutional challenges are still valid, a point which the Defendants never disputed before the Court of Appeals and which they cannot now belatedly raise. *FTC v. Grolier, Inc.*, 462 U.S. 19, 23, n.6 (1983).

proceeding to arbitration they are waiving their right to obtain *de novo* review of any subsequent award; and (5), the Notice is confusing and constitutionally defective because it does not clearly explain which standard is being used for charging bar activities and because it fails to properly explain a $50,914 charge. See Plaintiffs' Brief 40–41.

Two, Mr. Smay's dismissal as a defendant on qualified immunity grounds and the failure to remand for trial the genuine issues of material fact charging that he is continuing his practice and policy of subverting Plaintiffs' rights, (Docket No. 379), conflicts with *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985), which holds: "if the facts are as asserted by the plaintiff, the defendant is not immune. At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may escape liability." The Court added: "a reviewing court must consider the plaintiffs' factual allegations in resolving the immunity issue." *Id.*, at 529 (footnote omitted). The court's refusal to do that here conflicts with this legal principle.

Moreover, since Mr. Smay has never raised a qualified immunity defense for any of his post-1990 actions arising under the present dues reduction plan, he is not entitled to immunity for this latter period under *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982), which holds: "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official" (citation omitted).

The holding further conflicts with *Mitchell* because it erroneously grants Defendant Smay blanket immunity for all his pre-1990 conduct even though he is being charged with: (1) engaging in a practice and policy of subverting Plaintiffs' rights before July 1988, *supra*, at 8; (2) depriving Plaintiffs of their liberty and property in violation of the Due Process Clause of the Fourteenth Amendment, *supra*, at 7; and (3), forcing Plaintiffs to financially support LAWPAC, a contention that he does not even dispute. Plaintiffs maintain that their rights in all these areas were clearly established at the time and that no immunity can be granted even if one presupposes that Plaintiffs' First Amendment *Keller* rights were not clearly established

before 1990—a contention they in any event dispute. See Plaintiffs' Brief 30–33.

Three, the failure to remand for trial the allegations against Mr. Smay and Defendant Justices conflicts with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), which holds: "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." That did not happen here.

The Court of Appeals' holding contains no mention whatsoever of: (1) Lien's letter, *supra*, at 2, which Mr. Smay personally reviewed, (Smay 1989 Dep., at 55–56), urging Defendant State Bar to conceal its relationship to LAWPAC; (2) Mr. Smay's admissions that time records were not filled out and filed until the eleventh of the following month and his inability to identify how much of Plaintiffs' dues money was spent on LAWPAC and particular legislative and political activities, *supra*, at 4; (3) Lien's admissions regarding his own negligent time-keeping and record-keeping practices and his inability to relate how much of his time was spent on LAWPAC, *supra*, at 3; (4) Mr. Smay's admission that Plaintiffs' dues money was used to support Lien's LAWPAC activities, *supra*, at 2–3; (5) Mr. Smay's own testimony relating to his possible *ex parte* communication with a representative of Defendant Justices over the retroactive date of a dues reduction plan, *supra*, at 4–5; and (6), the disputed questions of fact surrounding the present dues reduction plan set forth in Plaintiffs' Second Jury Demand.

The court also failed to follow this legal principle when it dismissed Defendant Justices as defendants and failed to view the record in Plaintiffs' favor, since it totally ignored Defendant Justices' sworn representations that they would not deny their enforcement role[27] and their May 26, 1988, and June 1, 1988,

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[27] Plaintiffs' Complaint, ¶20 at 5, states that Defendant Justices are being sued in their enforcement role. If there is a factual dispute over their role, it must be resolved at trial where Plaintiffs can point to Defendant Justices' own

(continued...)

representations that they do, in fact, enforce the mandatory membership rule (Sep. App. 304) (Docket No. 146). The court also ignored: (1) their June 1983 and March 1984 representations that a dues reduction plan covering all legislative and political activities would be retroactive to July 1, 1983; (2) Mr. Smay's possible *ex parte* communication with one of their agents; and (3), their failure to inform State Bar members that they were reconsidering those decisions, thereby violating Plaintiffs' right to fair notice.[28]

Four, the failure to find that Defendant Justices are proper parties—after they swore that they would not deny their enforcement role—conflicts with *Supreme Court of Va. v. Consumer's Union*, 446 U.S. 719, 736–739 (1980); *Pulliam v. Allen*, 466 U.S. 522, 543–544 (1984), which hold that judges can be sued in their enforcement capacity for declaratory relief and an award of attorney fees, which is exactly what Plaintiffs are seeking here.

The Court of Appeals' incorrect finding that Plaintiffs are seeking injunctive relief against Defendant Justices and that they are not entitled to prospective relief under *Steffel v. Thompson*, 415 U.S. 452 (1974) (App., *infra*, 14a), is therefore misplaced. In fact, *Steffel* supports Plaintiffs' claim since it holds: "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights" *Id.* at 459. It also provides: "a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally

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[27](...continued)
admissions that they help enforce SCR:10:03(5)(b), and their sworn representations in response to Plaintiffs' first set of interrogatories that they would not deny their enforcement role (Docket No. 108), Response No. 38, at 3.

[28] It is axiomatic that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950).

flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity ..." *Id.* at 462. That is the precise dilemma Plaintiffs face here if their request for declaratory relief is not granted.

Moreover, it was fundamentally unfair for the court to dismiss Defendant Justices and thereby reward them for falsely swearing that they would not deny their enforcement role, which is what the court did by expecting Plaintiffs' Counsel at oral argument to identify specific attorneys who have been disciplined by Defendant Justices over their failure to pay bar dues (App., *infra*, 14a). At that time, Plaintiffs' Counsel explained that he could not do so because he had relied on their representations in not conducting any further discovery on this issue and that he was never given the chance to obtain such information once they filed their Motion to Dismiss.

Five, the court's failure to identify and to remand for trial Plaintiffs' procedural due process allegations against Mr. Smay and Defendant Justices, *supra*, at 7, conflicts with *Carey v. Piphus*, 435 U.S. 247 (1978), as Plaintiffs are entitled to a jury trial to determine whether these Defendants deprived Plaintiffs of their liberty and property without due process of law.

The holding similarly conflicts with *Beacon Theaters v. Westover*, 359 U.S. 500 (1959), because it deprives Plaintiffs of their constitutional right to trial by jury under the Seventh Amendment to the United States Constitution (App., *infra*, 71a) to resolve all of the disputed genuine issues of material fact involving Mr. Smay and Defendant Justices, including the matters spelled out in Plaintiffs' Second Jury Demand (Docket No. 379).

Review thus is needed to vindicate Plaintiffs' constitutional right to trial by jury and to rectify the aforementioned conflicts with the Court's prior holdings caused by the mischaracterization of Plaintiffs' claims.

CONCLUSION

For all these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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